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# Conflict of Laws and Unification of Law by International Convention: The Experience of the Brussels Convention of 1924<sup>1</sup>

A. N. Yiannopoulos\*

## INTRODUCTION

Large scale international trade needs, in addition to other favorable conditions, a certain measure of security and predictability with regard to the enforcement of obligations.<sup>2</sup> The very fact, however, that a commercial transaction is connected with more than one legal system creates an uncertainty as to the existence, size, and content of obligations. Due to the diversity and "contrariety"<sup>3</sup> of the law prevailing in various parts of the world, an interested party may not readily ascertain the place where a potential dispute can be settled, the governing substantive law (since that *choice* will depend to a large extent on the forum), and whether a judgment obtained in one country can be enforced in another country.<sup>4</sup>

Traditionally, such problems arising in transactions involving multiple contacts have been dealt with by resorting to rules of conflict of laws.<sup>5</sup> The function of conflict of law rules is to refer a given dispute to a definite legal system in accordance with a variety of contacts considered significant for the legal relation in question.<sup>6</sup> In commercial transactions the parties

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1. INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO BILLS OF LADING, LEAGUE OF NATIONS, TREATY SERIES 17 (1931).

2. See 2 RABEL, *CONFLICT OF LAWS: A COMPARATIVE STUDY* 407, 429 (1947); *Id.*, *Conflict Rules on Contracts*, in *CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS* 127 (1949).

3. See LIVERMORE, *DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS* (1820); Stödter, *Zur Statutenkollision im Seefrachtvertrag*, in *LIBER AMICORUM OF CONGRATULATIONS TO ALGOT BAGGE* 220, 221 (1955).

4. See EHRENZWEIG, *CONFLICT OF LAWS* 1 (1959). Cf. Matteucci, *Unification of Conflicts Rules in Relation to International Unification of Private Law*, in *CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS* 150, 151 (1949).

5. Cf. Matteucci, *supra* note 4, at 151. A conflicts rule furnishes a test for determining which of several possibly applicable laws shall be applied to the case in hand. See Morris, *The Choice of Law Clauses in Statutes*, 62 L.Q. REV. 170, 172 (1946); EHRENZWEIG, *op. cit. supra* note 4, at 1.

6. See NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 1 (1943); STUMBERG, *CONFLICT OF LAWS* 1 (1951).

ordinarily enjoy a large measure of autonomy<sup>7</sup> and thus they may, by selecting the proper contacts, subject their relations to a desired legal system which will eventually furnish the substantive rule of decision.<sup>8</sup>

While the conflicts method secures a minimum of certainty, several drawbacks are apparent. Ordinarily, it presupposes a thorough familiarity with a number of legal systems both with regard to substantive law and conflict of law rules.<sup>9</sup> Further, the conflict of law rules prevailing in various countries are not generally accepted and uniform provisions of public international law,<sup>10</sup> but "national" rules which may differ from country to country.<sup>11</sup> Thus, resort to choice of law is conducive to certainty only after the forum itself is known.<sup>12</sup>

Beginning with the last years of the past century, a new method started to take shape as it became increasingly apparent that a higher measure of certainty and predictability could be achieved by making uniform, first, the conflicts rules, and then, the substantive law prevailing in various parts of the world.<sup>13</sup> While such uniformity may be achieved in several ways,<sup>14</sup> adop-

7. See Levin, *Party Autonomy: Choice of Law Clauses in Commercial Contracts*, 46 GEO. L.J. 260 (1957); Stödter, *supra* note 3, at 229, 230.

8. See in general, Neumayer, *Autonomie de la volonté et dispositions impératives en droit international privé des obligations*, [1957] REV. CR. DR. INT. PR. 579 *et seq.*; Batiffol, *Public Policy and the Autonomy of the Parties: Interrelations Between Imperative Legislation and the Doctrine of Party Autonomy*, in CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS 68 (1949); Levin, *Party Autonomy: Choice of Law Clauses in Commercial Contracts*, 46 GEO. L.J. 260 (1957).

9. See Hamel, *Perspectives et limites de l'unification du droit privé*, [1951] II L'UNIFICATION DU DROIT 60; text at notes 64-65 *infra*.

10. See 1 BARTIN, *PRINCIPES DE DROIT INTERNATIONAL PRIVÉ* 74 *et seq.* (1930); NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 8 (1943). *But cf.* DE NAUROS, *LES TRAITÉS INTERNATIONAUX DEVANT LES JURISDICTIONS NATIONALES* 58 (1934) ("international law"). See also 2 SCELLE, *PRÉCIS DE DROIT DES GENS* 320 *et seq.* (1932) (conflicts rules determine the "legislative jurisdiction" of nations, and rest on a customary rule of public international law permitting the practice). *But cf.* COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 72 (1949), airing all possible doubts.

11. See 1 BARTIN, *PRINCIPES DE DROIT INTERNATIONAL PRIVÉ* 74 *et seq.* (1930); Matteucci, *supra* note 4, at 152; JENKS, *THE COMMON LAW OF MANKIND* 51 (1958); WESTLAKE, *PRIVATE INTERNATIONAL LAW* 1 (1925); CHESHIRE, *PRIVATE INTERNATIONAL LAW* 1 (1957). See also Chauveau, *Des conventions portant loi uniforme*, [1956] CLUNET 570, 575. *But cf.* SCELLE, *op. cit. supra* note 10, at 320 *et seq.*

12. See Matteucci, *supra* note 4, at 152. Certainty may be deceptive in case of frequent reference to notions of public policy. *Ibid.* See also Oliver, *Standardization of Choice of Law Rules for International Contracts: Should there be a new beginning?*, 53 AM. J. INT. L. 385, 386 (1959).

13. See BARTIN, *op. cit. supra* note 11, at 86; SCHERRER, *ZUR FRAGE DER INTERNATIONALEN VEREINHEITLICHUNG DES PRIVATRECHTS* 17 (1939).

14. See Chauveau, *supra* note 11, at 573. And in general, SCHERRER, *op. cit. supra* note 13, at 20 *et seq.*; SCHNITZER, *DE LA DIVERSITÉ ET DE L'UNIFICATION*

tion of international conventions incorporating the rules intended to become uniform in all of the contracting states emerged as, perhaps, the most important method.<sup>15</sup>

The contract for the carriage of goods (affreightment) by sea-going vessels under bills of lading was one of the first areas of commercial law to attract attention for possible unification of law.<sup>16</sup> Actually, unification of law in that area was more than simply desirable; it was virtually necessary due, on the one hand, to the great importance of maritime transportation for the economy of several countries and the world trade in general, and, on the other hand, due to a sharp conflict among national regulations of the contract of affreightment and the liabilities of sea-carriers under bills of lading.<sup>17</sup> A brief look to the practices prevailing at the end of the past century discloses the disturbing fact that the world was divided in carriers' countries and shippers' countries. In some countries cargo interests had prevailed and strict liability had been imposed on sea-carriers for loss or damage to the goods carried; in other countries hull interests had prevailed and the sea-carriers enjoyed an almost unlimited "freedom of contracting."<sup>18</sup> Further, the national policy favoring the shipper or the carrier was frequently brought into the field of conflict of laws by the adoption of choice of law rules designed to safeguard the application of the national law and its standards to bills of lading involving international contacts.<sup>19</sup> The liabilities of the parties thus differed with the standards applied by a fortuitous or selected forum, and as a result, security in international bills of lading was minimized, the negotiability of such instruments was imperilled, and world trade was seriously hampered.<sup>20</sup> The remedy was thought to be in a uniform international regulation of bills of lading,<sup>21</sup> and after several decades

DU DROIT 20 *et seq.* (1946); Matteucci, *Les méthodes de l'unification du droit*, [1956] II L'UNIFICATION DE DROIT 2 *et seq.*; Batiffol, *Conflict Avoidance in European Law*, 21 LAW & CONTEMP. PROB. 571 (1956); Lederman, *Conflict Avoidance by International Agreement*, 21 LAW & CONTEMPORARY PROBLEMS 581 (1956).

15. Cf. Matteucci, *supra* note 4; Demogue, *L'unification internationale de droit privé* [1927] REV. DR. INT. 699, 722; Chauveau, *supra* note 11, at 575.

16. Cf. Matteucci, *supra* note 4, at 154.

17. See Yiannopoulos, *Bills of Lading and the Conflict of Laws: Validity of "Negligence" Clauses in France*, 7 AM. J. COMP. L. 516 (1958).

18. See KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 119 (hereinafter Knauth); COLE, THE CARRIAGE OF GOODS BY SEA ACT 11 (1937).

19. See 1 RIPERT, DROIT MARITIME 255 (1952); Yiannopoulos, *supra* note 17, at 516, n. 4.

20. See KNAUTH 120; ASTLE, SHIPOWNERS' CARGO LIABILITIES AND IMMUNITIES 7 (1951).

21. See KNAUTH 124.

of preparatory work by international institutions and business organizations, the movement for unification culminated in an international Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels, on August 25, 1924.<sup>22</sup>

The purpose of the Brussels Convention was to standardize on the international level the liabilities of the carriers so that the outcome of a possible litigation would be the same in the courts of any of the contracting states.<sup>23</sup> Whether the Brussels Convention fulfilled its purpose, and to what extent, remains still to be seen; the present paper has a much more limited scope. In the following discussion is an effort at ascertaining — in the light of the general theory concerning conventions for uniform law — the juridical nature of the Brussels Convention and the scope of the intended unification of law. Then, in a forthcoming paper, the effects of unification will be considered in the light of legislative and judicial practice in all contracting states.

#### DOCTRINAL OBSERVATIONS IN GENERAL

Conventions for uniform law,<sup>24</sup> representing a relatively new development in the field of international relations, involve complex issues which, in absence of authoritative determination by international agencies, cannot be always resolved with certainty. Reliance on secondary authorities<sup>25</sup> is the only avenue of ap-

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22. See LEAGUE OF NATIONS, TREATY SERIES 17 (1931).

23. See KNAUTH 136; Yiannopoulos, *supra* note 17, at 518.

24. International agreements assume various forms and are given various descriptive designations such as treaties, conventions, acts, etc. The term *treaty* is usually employed in formal agreements of a political or quasi political character, and applies, ordinarily but not exclusively, to agreements on important objects other than the establishment of rules of law. The term *convention* applies frequently where there is an attempt at establishing rules of law (Hague Conventions, Geneva Conventions). Treaties and conventions do not differ as regards their structure, preambles, and their concluding articles with reference to ratification and denouncement. The two terms are very frequently used indiscriminately. See 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 1-3 (1943).

25. On conventions for uniform law, see Matteucci, *Les méthodes de l'unification du droit*, [1956] II L'UNIFICATION DU DROIT 2 *et seq.*; *id.*, *Unificazione internazionale del diritto privato*, XII 2 NUOVO DIGESTO ITALIANO 694 (1940); Gutteridge, *The Technique of the Unification of Private Law*, [1939] BR. YRBK. OF INT. L. 37; Hamel, *Perspectives et limites de l'unification du droit privé* [1951] II L'UNIFICATION DU DROIT 61; Vallindas, *Uniformité d'interprétation des conventions de droit international privé*, [1932] REV. DR. INT. PR. 727; *Id.*, *Autonomy of International Uniform Law*, [1955] REV. HELL. DR. INT. 8; Mann, *The Interpretation of Uniform Statutes*, 62 L.Q. REV. 278 (1946); Drion, *Vers une interprétation uniforme des Conventions du droit aérien privé*, [1953] REV. D. AÉRIEN 299; Limpens, *Les constantes de l'unification du droit privé*, [1958] REV. INT. DR. COMP. 277 *et seq.*; Sarfati, *Comparative Law and the Unification of Law*, 26 TUL. L. REV. 317 (1952); PLAISANT, *TRAITÉ DE DROIT CONVENTIONNEL*

proach, though it may frequently lead to controversial assertions. For the purpose of the following discussion, relevant issues are only those concerning the binding force of international conventions on contracting states, courts, and individuals, the juridical nature of the rules contained in international conventions, and the problem of the scope of unification.

### *Binding Force of International Conventions*

International conventions for uniform law produce effects which should be measured in the light of both international and domestic law. Indeed, as it will be shown, conventions for uniform law function in two distinct fields, and much of confused discussion in the legal literature is due to the fact that distinction between international and municipal effects of conventions is not always made.<sup>26</sup>

It is a well-established proposition of international law that properly concluded and ratified<sup>27</sup> conventions for uniform law create an international obligation for the contracting states to give effect to the rules agreed upon as rules of law within their territories;<sup>28</sup> and, in case this obligation is not properly dis-

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INTERNATIONAL CONCERNANT LA PROPRIÉTÉ INDUSTRIELLE (1949); Chauveau, *Des conventions portant loi uniforme*, [1956] CLUNET 590; Bayer, *Auslegung und Ergänzung International Vereinheitlicher Normen durch Staatliche Gerichte*, 20 RABEL'S Z. 603 (1955); and in general, L'UNIFICATION DU DROIT, APERÇU GÉNÉRAL DES TRAVAUX POUR L'UNIFICATION DU DROIT PRIVÉ (PROJETS ET CONVENTIONS) (Rome, 1948-1959).

26. See Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 CALIF. L. REV. 643, 648 (1937).

27. The question of "valid" conclusion and ratification of international conventions may involve issues of both international and domestic law. In general, with regard to the binding effect of conventions so far as the international sphere is concerned, the answer can only be given by the rules of international law. Cf. Riesenfeld, *supra* note 26, at 649. However, the effect of constitutional provisions upon the international validity of conventions is controversial. See RESEARCH IN INTERNATIONAL LAW, HARVARD LAW SCHOOL, Part III, Comments to Art. 21 (1935). The prevailing view is that international law "relegates" certain issues to national constitutions. See VERDROSS, VÖLKERRECHT 101 (1959); ROUSSEAU, DROIT INTERNATIONAL PUBLIC 26 (1953).

28. See 1 GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC 28 (1953); VERDROSS, *op. cit. supra* note 27, at 127; ROUSSEAU, DROIT INTERNATIONAL PUBLIC APPROFONDI 56 (1958); Hamel, *Perspectives et limites de l'unification du droit privé*, [1951] II UNIFICATION DU DROIT 61; Chauveau, *Des conventions portant loi uniforme*, [1956] CLUNET 575; COLLIARD, INSTITUTIONS INTERNATIONALES 225 (1956). This obligation may be express (statement in the text of the convention itself) or implied (by signing, ratifying, or adhering to the convention). See Chauveau, *supra*; Vallindas, *General Principles of Law and the Hierarchy of the Sources of International Law*, in FESTSCHRIFT SPIROPOULOS 424 (1957). There is no general agreement, however, as to the time that the obligation attaches. Cf. 1 OPPENHEIM-LAUTERPACHT, INTERNATIONAL LAW 813 (1948).

charged, international responsibility may attach.<sup>29</sup> The specific content of this international obligation ordinarily depends on the provisions of the convention itself.

Thus, conventions for uniform law, quite frequently, contain provisions concerning the method to be followed by the contracting states in giving effect to the rules adopted therein. The uniform rules may be appended in a schedule, with an attendant obligation that they shall be given effect in the same form as adopted, or provision may be made for their incorporation in a form appropriate to the national legislation of the contracting states. Further, provision may be made with regard to the scope of unification and the area of application of the uniform rules. In all these cases the contracting states undertake an international obligation, which may be express or implied, to comply with the provisions of the convention. In case no such provisions are made, a proper interpretation of the convention in the light of international practice might furnish conclusions with regard to the scope of the obligations assumed by the contracting states.

Ordinarily, international conventions contain also provisions setting out the requirements for their becoming effective and binding upon the signatory countries. A usual provision to that effect is one providing that the convention shall become effective upon the lapse of a certain period of time following the deposition of a stated number of ratifications.<sup>30</sup> In absence of such provision, or other indication, it seems that conventions become binding on the contracting states upon their individual exchange of ratifications.<sup>31</sup>

Ratification is usually a voluntary state act; by signing an international convention a state does not assume by implication the obligation to ratify the same. Only in exceptional cases, and according to an express intention of the contracting states, is the customary requirement of ratification waived.<sup>32</sup> In such a case, a convention may produce its international effects and become

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29. See GUGGENHEIM, *op. cit. supra* note 28, at 32; GOULD, AN INTRODUCTION TO INTERNATIONAL LAW 332 (1957); OPPENHEIM-LAUTERPACHT, *op. cit. supra* note 28, at 305, 307, 325. "The comprehensive notion of international delinquency ranges from ordinary breaches of treaty obligations."

30. *Cf.* Brussels Convention, art. XI; *Id.* art. XIV: "The present convention shall take effect, in the case of the States which have taken part in the first deposit of ratification, one year after the date of the protocol recording such deposit."

31. *Cf.* 1 SCHWARZENBERGER, INTERNATIONAL LAW 435 *et seq.* (1957).

32. See ROUSSEAU, DROIT INTERNATIONAL PUBLIC APPROFONDI 30-34 (1958); GOULD, AN INTRODUCTION TO INTERNATIONAL LAW 309-310 (1957); SCHWARZENBERGER, *loc. cit. supra* note 31.

binding on the contracting states upon the realization of any other attached condition, without the need of ratification.

At this point, the question may be raised whether international conventions for uniform law become binding on courts and individuals in the contracting states by virtue of ratification and by direct operation of international law. The question is necessarily connected with the broader issue of the relation between international and municipal law. And it is precisely in this field that a controversy is raging among theoreticians of international law. According to the so-called monistic doctrine, international law (both customary and conventional) is applicable in national courts "as such" and by its own force.<sup>33</sup> On the other hand, according to the prevailing so-called dualistic doctrine, international law is applicable in national courts only by virtue of a constitutional, statutory, or customary rule of domestic law.<sup>34</sup> Thus, international law becomes applicable only after its "transformation" by virtue of a domestic rule of incorporation.

The juridical nature of conventions for uniform law is controversial.<sup>35</sup> According to the prevailing opinion among scholars, such conventions do not establish rules of international law. But even if that were the case, we could conclude on the basis of the prevailing doctrine in international law that conventions for uniform law are not as such applicable to private relations; courts and individuals are bound only by their national laws, and conventions become binding on them only insofar as they have been transformed into domestic law by virtue of some domestic rule. However, it should be noticed that in recent international practice exceptions are known whereby conventions may become binding on courts and individuals by virtue of ratification alone;<sup>36</sup> such exceptions are ordinarily based on an express undertaking by the contracting states.

33. See Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 403 *et seq.* (1952); *id.*, *Théorie générale du droit international public*, [1932] IV A.D.I.R.C. 119 *et seq.*; Verdross, *VÖLKERRECHT* 60 *et seq.* (1950); Papalambrou, *Le problème de la "transformation" et la question de la validité des actes étatiques "contraires" au droit international*, [1950] REV. HELL. DR. INT. 234.

34. See Triepel, *VÖLKERRECHT UND LANDESRECHT* (1899); *id.*, *Les rapports entre le droit interne et le droit international*, [1923] A.D.I.R.C. 77-121; Anzilotti, *CORSO DI DIRITTO INTERNAZIONALE* (1934); Walz, *VÖLKERRECHT UND STAATLICHES RECHT* (1933); *Id.*, *Les rapports du droit international et du droit interne*, [1937] III A.D.I.R.C. 379-456; 1 Strupp, *ÉLÉMENTS DU DROIT INTERNATIONAL PUBLIC* 19 *et seq.* (1930). *Cf.* Rousseau, *DROIT INTERNATIONAL PUBLIC APPROFONDI* 1 *et seq.* (1958).

35. See text at note 44 *et seq.*, *infra*.

36. See Dahm, *VÖLKERRECHT* 53 *et seq.*, 411-418 (1958). *Cf.* Rousseau, *op. cit. supra* note 34, at 63; Verdross, *op. cit. supra* note 33, at 60, 127.



As international conventions are not ordinarily binding on courts and individuals in the contracting states by virtue of international law, their municipal effects necessarily depend on the law of each state. Ordinarily, constitutional provisions establish the procedures according to which conventions may become part of the law of the land.<sup>37</sup>

According to some constitutions, properly signed and ratified conventions are as such part of the law of the land.<sup>38</sup> Judicial practice and doctrine, however, tend to construe such provisions narrowly, and distinction is ordinarily drawn between self-executing conventions and conventions which involve additional legislation. The former are rendered directly applicable in national courts by mere ratification and as soon as they become internationally effective; the latter are given the force of law in the domestic sphere by virtue of implementing legislation. The problem thus arises as to which conventions are self-executing. The answer ordinarily depends on constitutional interpretation and on the intention of the contracting states, namely, whether an agreement was made which by its terms was to operate directly on private relations or an engagement was undertaken to enact the appropriate legislation.<sup>39</sup>

Other constitutions, however, provide that conventions, without distinction, are rendered applicable in municipal courts only after their "execution" by special statute or ordinance,<sup>40</sup> or even after their enactment into law in accordance with the usual

37. Constitutional provisions can be found in U. N. Leg. Ser. No. 3 and in PEASLEE, *CONSTITUTIONS OF NATIONS I-III* (1950). Cf. notes 38, 40-41, *infra*.

38. See e.g., Article VI (2) of the United States Constitution; Article 113 of the Swiss Constitution. Cf. Article 55 of the French Constitution of Oct. 4, 1958; Article 49 (1) of the Austrian Constitution. See also Riesenfeld, *supra* note 26, at 650 (United States); Rice, *The Position of International Treaties in Swiss Law*, 46 AM. J. INT. L. 641 (1952) (Switzerland). Cf. Dehaussy, *Les conditions d'application des normes conventionnelles sur le for interne français*, [1960] CLUNET 702; note 40 *infra*.

39. See Riesenfeld, *supra* note 26, at 650. Cf. Chief Justice Marshall's opinion in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); German B.G.H. June 21, 1955, 18 B.G.H.Z. 22, 26: "The provisions of an international convention may apply directly in favor of individuals only where their content, purpose, and method of execution leaves no doubt that such a function was intended."

40. Cf. Dehaussy, *Les conditions d'application des normes conventionnelles sur le for interne français*, [1960] CLUNET 702; (France); Münch, *Droit international et droit interne d'après la Constitution de Bonn*, [1950] REV. INT. DR. GENS 5 (Germany); Monaco, *Die Internationalen Verträge und die neue italienische Verfassung*, 6 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 285 (1954) (Italy); Seidl-Hohenveldern, *Relations of International Law to Internal Law in Austria*, 49 AM. J. INT. L. 451, 460 (1955) (Austria). In many countries, the topic of execution is controversial. See Riesenfeld, *supra* note 26, at 648, n. 22.

legislative procedures involved in all law-making.<sup>41</sup> Most constitutions follow this approach and require implementing action in all cases though several differences are displayed with regard to the particular method whereby conventions become part of the law of the land.<sup>42</sup> Ratification (which may be made by the executive branch of the government with or without the legislature's authorization or consent) is still a necessary prerequisite for the international validity of the convention. In turn, the international validity of the convention may (under domestic law) be a prerequisite for the application of the convention in national courts.<sup>43</sup>

### *Juridical Nature of Conventions for Uniform Law*

The juridical nature of international treaties, and conventions for uniform law, has been the subject matter of a formidable literature.<sup>44</sup> Conventions for uniform law actually involve additional difficulties because they ordinarily contain two distinct sets of provisions. On the one hand, they include the rules which are intended to become uniform in all contracting states, and, on the other hand, provisions defining the international obligations assumed by the contracting states among themselves.

41. See Mann, *The Interpretation of Uniform Statutes*, 62 L.Q. REV. 278 (1946) (Great Britain).

42. For a comparative survey of national practices, see DAHM, *VÖLKERRECHT* 57-68 (1958); MENZEL, *KOMMENTAR ZUM BONNER GRUNDGESETZ*, under Art. 25; 2 MATERS, *INTERNATIONAL LAW IN NATIONAL COURTS* (1932); Bayer, *Auslegung und Ergänzung International Vereinheitlicher Normen durch Staatliche Gerichte*, 20 RABEL'S Z. 603 (1955); Oliver, *Historical Development of International Law: Contemporary Problems of Treaty Law*, [1955] II A.D.I.R.C. 421; Constantopoulos, *Verbindlichkeit und Konstruktion des positiven Völkerrechts* 196-208 (1948); Calogeropoulos-Stratis, *La ratification des traités d'après les constitutions récentes*, [1949] REV. HELL. DR. INT. 33.

43. Cf. Dehaussy, *Les conditions d'application des normes conventionnelles sur le pour interne français*, [1960] CLUNET 702; Rice, *supra* note 38, at 644.

44. See note 25 *supra*. On the juridical nature of treaties, see Réglade, *De la nature juridique des traités internationaux*, [1924] REV. DR. PUB. SCI. POL. 510; COLLIARD, *INSTITUTIONS INTERNATIONALES* 220 *et seq.* (1956); Oliver, *Historical Development of International Law: Contemporary Problems of Treaty Law*, [1955] II A.D.I.R.C. 421; Kraus, *Système et fonctions des traités internationaux*, [1934] IV A.D.I.R.C. 317; Visscher, *La codification du droit international*, [1925] I A.D.I.R.C. 329; VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC* 308, *et seq.* (1955); 2 SCELLE, *PRÉCIS DE DROIT DES GENS* 332 *et seq.* (1932); 1 SCHWARZENBERGER, *INTERNATIONAL LAW* 421 (1957), with comprehensive bibliography, *id.* at 758 *et seq.*; 1 OPPENHEIM-LAUTERPACHT, *INTERNATIONAL LAW* 750 *et seq.* (1948); HARVARD RESEARCH OF THE LAW OF TREATIES, SUPPLEMENT TO AMERICAN JOURNAL OF INTERNATIONAL LAW, Part III 937 *et seq.* (1935); McNAIR, *LAW OF TREATIES* (1938); 1 BARTIN, *PRINCIPES DE DROIT INTERNATIONAL* 92 (1930); 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* (1943); ALLEN, *THE TREATY AS AN INSTRUMENT OF LEGISLATION* (1952); Rice, *The Position of International Treaties in Swiss Law*, 46 AM. J. INT. L. 641 (1952).

To the latter category belong the usual provisions relating to the international validity of the convention, its possible revision, and those concerning subsequent adherences. With regard to the juridical nature of such provisions, there is not much disagreement: they are contractual provisions functioning within the framework of international law and constituting a *lex inter partes*.<sup>45</sup>

There is no agreement, however, with regard to the juridical nature of the rules which are intended to become uniform in all contracting states.<sup>46</sup> Such rules are regarded as "international legislation," as a "model" for domestic legislation, or as belonging to a category by themselves. The issue has practical significance from both the viewpoints of international and domestic law.

According to a line of thought prevailing mostly on the continent, the rules adopted in an international convention for the unification of law constitute international legislation and belong to the sphere of public international law.<sup>47</sup> It follows that the content of the international obligation assumed is not only to give the rules agreed upon the force of law within the state<sup>48</sup> but

45. Cf. 1 SCHWARZENBERGER, *INTERNATIONAL LAW* 421 *et seq.* (1957); GOULD, *AN INTRODUCTION TO INTERNATIONAL LAW* 294 (1957).

46. Actually, one may speak of several schools of thought in this area. *But cf.* Lauterpacht, *The So-called Anglo-American and Continental Schools of Thought*, 12 BR. YRBK. OF INT. L. 43 (1931). Much of the difficulty actually results from the fact that a variety of notions prevail in various parts of the world with regard to the law of treaties in general. See SURVEY OF INTERNATIONAL LAW IN RELATION TO THE WORK OF CODIFICATION OF THE INTERNATIONAL LAW COMMISSION 52 (Memorandum submitted by the Secretary General, United Nations 1949).

47. See 2 SCELLE, *PRÉCIS DE DROIT DES GENS* 530 (1932); Chauvaux, *supra* note 25, at 575; DAVID, *DROIT CIVIL COMPARÉ* 106 *et seq.* (1950); DE NAUOIS, *LES TRAITÉS INTERNATIONAUX DEVANT LES JURISDICTIONS NATIONALES* 55 (1934). Cf. SCHERRER, *op. cit. supra* note 13, at 23; Mann, *supra* note 25, at 278: "The term 'International legislation' may be used with regard to treaties the text of which is being agreed upon and recommended for general acceptance at international conferences by the representatives of numerous nations, and which, if ratified, will by varying constitutional methods be infused into the municipal law of the contracting states." OPPENHEIM-LAUTERPACHT, *op. cit. supra* note 28, at 805. See also JENKS, *THE COMMON LAW OF MANKIND* 51 (1958); PLAISANT, *op. cit. supra* note 25, at 34 *et seq.*, *id.*, 73 ff. The Permanent Court of International Justice declared in the *Serbian Loans Case* that the rules of private international law "may be common to several states and may even be established by international conventions or customs and in the latter case may possess the character of true international law governing the relations between states." (Emphasis added.) See P.C.I.J. Series A, Ns. 21-22, p. 41.

48. With regard to methods of giving effect to uniform rules, see Matteucci, *supra* note 14, at 75 *et seq.* Ordinarily, conventions grant an option to the contracting states to give effect to the uniform rules directly as treaty law or to enact domestic legislation reproducing the provisions of the convention. This was the method followed in the Geneva conventions of June 7, 1930, on Bills of Exchange and Promissory Notes. By that convention, the contracting states bound

also to interpret and apply them as rules of international law.<sup>49</sup> This view may also have consequences from the viewpoint of domestic law, namely with regard to the method of incorporation; if the uniform rules constitute international legislation, effect may be given to them according to some national constitutions simply by ratification or by special executive acts without resorting to ordinary legislative procedures.<sup>50</sup>

According to another line of thought, treaties in general, and conventions for the unification of law, are regarded as contracts

themselves to introduce in their respective territories, either the original text of the convention or a statute in the national language reproducing the uniform rules annexed to the convention. Cf. Matteucci, *supra*, at 77 *et seq.* For a convention providing for promulgation of a series of national statutes rather than promulgation of the convention itself as treaty, see the Benelux Convention for Compulsory Civil Liability Insurance of Motorists (Jan. 7, 1955). According to that convention, the national legislation of the contracting states should incorporate certain fundamental principles set out in an annex. With regard to all other matters, national legislation was left intact. Cf. Matteucci, *supra*.

49. See Duez, [1925] REV. GEN. DR. 429, 441. The problem of interpretation of conventions for uniform law has been the subject of a heated controversy. In general, it has been said that "the maintenance of uniformity in the interpretation of a rule after its international adoption is just as important as the initial removal of divergencies." The Eurymedon, [1938] P. 41, 61. Yet, the danger of divergencies of interpretation cannot be excluded at present. Several writers urge the creation of International Tribunals charged with the duty of interpreting conventions for uniform law. See Mann, *The Interpretation of Uniform Statutes*, 62 L.Q. REV. 278, 290, n. 67, 291 (1946); Chauveau, *supra* note 25, at 591. Most countries have developed their own theories with regard to the interpretation of uniform legislation. In the United States "no authoritative announcement has as yet settled the principles governing interpretation of such statutes." Mann, *supra* at 288. Cf. McConaughy, *International Law as Practiced in State Courts*, 10 SO. CAR. L.Q. 189 (1958). In Great Britain, the courts are likely to construe such legislation in the light of previous authorities and to apply domestic canons of construction. See *Gosse Millard, Ltd. v. Canadian Government Merchant Marine, Ltd.*, [1929] A.C. 223, 230. *But cf.* *Stagg Line v. Foscolo Mango and Co.*, [1932] A.C. 328, 343, 350 (no "predilection for the former law"); McNair, *L'application et l'interprétation des traités d'après la jurisprudence britannique*, [1933] I A.D.I.R.C. 43. In Germany, the purely formal view that statutes reproducing the provisions of international conventions are pieces of national legislation has been rejected. See Mann, *supra*, at 287-288; Bayer, *Auslegung und Ergänzung International Vereinheitlichter Normen durch Staatliche Gerichte*, 20 RABEL'S Z. 603, 605 (1955). See also R.G. May 20, 1922, 104 R.G.Z. 352. In France, at least two lines of thought have developed. See 1 BARTIN, PRINCIPES DE DROIT INTERNATIONAL PRIVÉ 104 *et seq.* (1930) (uniform statutes must be interpreted with reference to domestic law as any other statute). *But cf.* DE NAUROS, LES TRAITÉS INTERNATIONAUX DEVANT LES JURISDICTIONS NATIONALES 59 (1934); DAVID, DROIT CIVIL COMPARÉ 106 (1950); 3 NIBOYET, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANÇAIS 375, 383 (1944) (international conventions must be interpreted as international legislation). See also Cass., May 16, 1949, [1949] D.M.F. 411; Benoist, *L'interprétation des traités d'après la jurisprudence française*, 6 REV. HELL. DR. INT. 103 (1953).

50. See Calogeropoulos-Sratis, *La ratification des traités d'après les constitutions récentes*, [1949] REV. HELL. DR. INT. 53; McNair, *The Method Whereby International Law Is Made To Prevail in Municipal Courts on an Issue of International Law*, 30 TRANSACTIONS OF THE GROTIUS SOCIETY 11 *et seq.* (1945); Papalambrou, *Le problème de la "transformation" et la question de la validité des actes étatiques "contraires" au droit international*, [1950] REV. HELL. DR. INT. 234.

among sovereigns.<sup>51</sup> The essence of the contract in the latter case is a model (without any force of law) according to which the national legislation of the contracting states must be formulated.<sup>52</sup> It follows that the obligation assumed by the contracting states is fully discharged by the introduction into the national legislation of rules identical with those of the model.<sup>53</sup> From the viewpoint of domestic law, the convention should be given the force of law in accordance with the normal legislative procedures provided for by the national constitution with regard to all law making.<sup>54</sup> The juridical nature of the uniform rules is thus similar to the nature of any other rules of domestic law;<sup>55</sup> and being in reality domestic law, the convention should also be interpreted as such.<sup>56</sup>

Finally, a compromising attitude has been taken by certain writers who suggest that the rules contained in international conventions for uniform law constitute a category by themselves;

51. See MORLEY, *TREATY LAW AND THE CONSTITUTION* 21 (1953): "Treaties are contracts among sovereigns"; 1 SCHWARZENBERGER, *INTERNATIONAL LAW* 421 (1957); OPPENHEIM-LAUTERPACHT, *op. cit. supra* note 28 at 792, n.1: "International treaties are contracts. . . . The tendency to speak of international treaties as international legislation rather than contracts, is a metaphor."

52. *Cf.* text at note 107 *infra*; SCHERRER, *op. cit. supra* note 14, at 23. This is the nature of the Uniform Laws prepared by the American Law Institute. The several States of the Union in choosing to adopt the "model" as a statute act voluntarily with the view to achieving and preserving uniformity among the states and not under constitutional mandate or international obligation. *Cf.* Matteucci, *supra* note 14, at 77; Nadelman & Reese, *The American Proposal at the Hague Conference on Private International Law to Use the Method of Uniform Laws*, 7 AM. J. COMP. L. 239 (1958). The proposal was that, as an alternative to international agreements, the possibilities inherent in the formulation of model laws be considered. It was regarded as "an unsettled novelty and met with little enthusiasm." See Oliver, *Standardization of Choice of Law Rules for International Contracts: Should there be a new Beginning?*, 53 AM. J. INT. L. 385, 386 (1959).

53. *Cf.* SCHERRER, *op. cit. supra* note 14, at 23.

54. *Cf.* VERDROSS, *VÖLKERRECHT* 69 *et seq.* (1955); SCHERRER, *op. cit. supra* note 14, at 23; note 50 *supra*.

55. See Jenks, *The Conflict of Law-making Treaties*, 30 BR. YRBK. OF INT. L. 401 (1953); McNair, *International Legislation*, 19 IOWA L. REV. 178 (1934), pointing out that the term "international legislation" is a metaphor since "the essence of 'legislation' is that it binds all persons subject to the jurisdiction of the body legislating, whether they assent to it or not, whether their duly appointed representatives assent to it or not" whereas international legislation binds only "parties who have duly signed the law-making treaty, and, where necessary, as it usually is, have ratified it." See also [1935] RABEL'S Z. 48, 49.

56. See Duez, [1925] REV. GEN. DR. 429, 441 (the judge is entitled to ignore public international law and to apply municipal law pure and simple; 1 BARTIN, *PRINCIPES DE DROIT INTERNATIONAL PRIVÉ* 104 *et seq.* (1930). See also note 49 *supra*. On the problem of interpretation of treaties in general, see YI-TING CHIANG, *THE INTERPRETATION OF TREATIES BY JUDICIAL TRIBUNALS* (1933); VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC* 308 *et seq.* (1955); 1 SCHWARZENBERGER, *INTERNATIONAL LAW* 488 *et seq.* (1957); Lauterpacht, *De l'interprétation des traités*, 43 I ANN. INST. DR. INT. 366-460 (1950); *id.*, 44 I pp. 197-223 (1952); *Id.*, 45 I pp. 225-230 (1953).

such conventions have two aspects, one international and the other domestic.<sup>57</sup> The international aspect consists in the fact that conventions for uniform law regulate relations among sovereigns as they contain an international law obligation to enact legislation in conformity with the convention, and in the origin and function of the uniform rules. The domestic aspect consists in the fact that the uniform rules are primarily intended to regulate relations of private individuals and in that the method of incorporation is ordinarily determined by domestic rather than international law.

Consequently, while the provisions defining the scope of the assumed obligations belong to the sphere of international law, the rules intended to become uniform are neither international legislation nor merely models for domestic legislation. They are not international legislation because the plenipotentiaries of the contracting states do not constitute a legislative organ of the international community, and because international law, ordinarily, regulates only relations among sovereigns. On the other hand, the uniform rules are not merely a model for domestic legislation because according to some constitutions effect may be given to them by ratification alone or by special statutes and ordinances without resorting to ordinary legislative procedures. And after their incorporation into the several legal systems one way or another, the interpretation of the uniform rules may be controlled by international rather than domestic law. This approach, placing emphasis on the distinctly dual character of conventions for uniform law, and claiming autonomy for "international uniform law,"<sup>58</sup> offers several advantages: leaves room for harmless differences of opinion with regard to the juridical nature of conventions for uniform law, explains sufficiently differences in legislative and judicial practices prevailing in various parts of the world, and may eventually result in an expansion of unification to the advantage of international relations.

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57. See OPPENHEIM-LAUTERPACHT, *op. cit. supra* note 28, at 805; Bayer, *Auslegung und Ergänzung International Vereinheitlicher Normen durch Staatliche Gerichte*, 20 RABEL'S Z. 603, 629 (1955), stressing the dual nature of international uniform law. The author further suggests that international tribunals may take jurisdiction on issues involving interpretation and application of conventions for uniform law (at 630). However, the court of International Justice has so far refrained from exercising jurisdiction to resolve conflicts in the interpretation of conventions for uniform law. See Bayer, *supra*, at 642. See also DAVID, *DROIT CIVIL COMPARÉ* 106 (1950). (Stressing "international origin"); JENKS, *THE COMMON LAW OF MANKIND* 51 (1958)."

58. See Vallindas, *Autonomy of International Uniform Law*, [1955] REV. HELL. DR. INT. 8; Chauveau, *supra* note 25, at 579.

### *Scope of Unification*

It is submitted that from the viewpoint of intended uniformity, and impact on problems of conflict of laws, international conventions for uniform law may be distinguished into two categories;<sup>59</sup> (a) those designed to suppress conflicts of substantive or choice of law rules by making such rules uniform in all of the contracting states;<sup>60</sup> and (b) those designed not only to suppress existing conflicts but to eliminate completely the necessity of resorting to choice of law rules by introducing uniform legislation applicable to international transactions or to both domestic and international transactions.<sup>61</sup>

*Unification of conflicts rules.* A certain measure of certainty is achieved where the parties know in advance that irrespective of the forum a potential dispute will be referred to a definite legal system in accordance with choice of law rules which are

59. On classification of conventions, see SCHERRER, *INTERNATIONALE VEREINHEITLICHUNG DES PRIVATRECHTS* 23 *et seq.* (1939), distinguishing between conventions applicable to international transactions alone and both to domestic and international transactions. However, Scherrer seems to consider the contact of nationality as the only possible tool for the delimitation of the area of application of such conventions, and, further, seems to confuse the "model"-type convention with the distinct problem of scope of unification. Chauveau, *supra* note 25, at 571, apparently sees only one type of convention for uniform law, *viz.*, that applicable to international transactions alone. DAVID, *DROIT CIVIL COMPARÉ* 106 (1950), distinguishes conventions for uniform law designed to modify the domestic law and others designed to create a parallel legal order, a specific regime for international transactions. SCHNITZER, *DE LA DIVERSITÉ ET DE L'UNIFICATION DU DROIT* 32 *et seq.* (1946), distinguishes between conventions designed to eliminate conflicts of international laws and treaties creating uniform law either for international relations or for both international and domestic relations.

On the problem of classification of treaties in general, see OPPENHEIM-LAUTERPACHT, *op. cit. supra* note 28, at 793; 1 ROUSSEAU, *PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC* 134 *et seq.* (1944); Kraus, *Système et fonctions des traités internationaux*, [1934] IV A.D.I.R.C. 317, 336 *ff.*, where treaties "for the establishment of uniform law" are placed in a category by themselves; 1 ARMINJON, *TRAITÉ DE DROIT COMPARÉ* 96 *et seq.* (1950); DE NAUROIS, *LES TRAITÉS INTERNATIONAUX DEVANT LES JURISDICTIONS NATIONALES* 55 (1934). Continental writers usually distinguish between *traité-loi* and *traité-contrat*. See Réglaide, *supra* note 43. For a historical development of the doctrine and a critique, see Kraus, *supra* at 333; Arminjon, *supra* at 96 *et seq.* The term *traité-contrat* applies to treaties regulating opposing interests among contracting states or terminating disputes (*e.g.*, Treaties of Peace); the term *traité-loi* applies to instruments deriving from an accord of wills oriented to the same end which is to subject the contracting states to an objective rule of law. Cf. 2 SCELLE, *PRÉCIS DE DROIT DES GENS* 332 (1932); 1 SCHWARZENBERGER, *INTERNATIONAL LAW* 421 *et seq.* (1957).

60. See 1 BARTIN, *PRINCIPES DE DROIT INTERNATIONAL PRIVÉ* 85 *et seq.* (1930). Cf. SCELLE, *op. cit. supra* note 59, at 530 *et seq.*

61. See Matteucci, *Les méthodes de l'unification du droit*, [1956] II L'UNIFICATION DU DROIT 35: "One must distinguish between uniform rules which are meant to govern only relationships qualified as international (on the basis of a criterion of qualification established by the same rules) and those rules, which, on the contrary, must also apply to domestic relationships." See also BARTIN, *op. cit. supra* note 60, at 86 *et seq.*

everywhere the same.<sup>62</sup> Interested parties will thus have the opportunity to choose the applicable law by selecting the proper contacts without advance information as to the conflicts law of a number of countries. This result may be achieved by international conventions designed to make uniform the choice of law rules in the various contracting states.<sup>63</sup> Under such conventions, differences of substantive regulation still persist; the convention merely delimits the respective area of application of the law of the contracting parties and determines the cases in which one of the national legislations will apply to the exclusion of all others.<sup>64</sup> Yet, certainty will be deceptive in some cases as the interpretation of the applicable law may differ with the forum, and as its varying substantive content may not be readily ascertainable.<sup>65</sup> Further, resort to the notion of public policy may in some cases exclude the application of foreign law.<sup>66</sup>

*Unification of substantive law.* A still higher measure of certainty and predictability is achieved where differences in national legislations are eliminated by adoption of uniform substantive rules of law in accordance with the provisions of an in-

62. See Matteucci, *supra* note 4, at 152. Originally, conventions for uniform law were regarded as a matter of conflicts law exclusively; and further, the situation was confused with unification by voluntary adoption of foreign law. See Chauveau, *supra* note 25, at 753.

63. This has been the moving force behind all efforts for the adoption of an international convention designed to unify the choice of law rules governing the contract of affreightment. See Comité Maritime International, International Subcommittee on Conflict of Laws, Minutes of the Brighton Meeting, Sept. 21, 1954. At this point, three draft resolutions for an "International Convention of the Law to be applied to Contracts of Maritime Transports of Goods" are under consideration. See Comité Maritime International, International sub-committee on Conflict of Laws concerning Contracts of Carriage, Minutes of the Brighton Meeting, Sept. 21, 1954. According to the first draft resolution, the law of the place of shipment should be compulsorily applicable. See Art. 2, I, p. 13. The second draft resolution proposes application of the law of the principal business establishment or residence of the carrier. See Art. 2, I. Finally, the third draft resolution provides for application of the law of the flag. See Art. 2, I-III, p. 25. Accompanying reports or express caveats make it clear that the proposed convention will leave intact Art. X of the Brussels Convention. See Stödter, *supra* note 3, at 222.

To this category belong also the various Hague conventions, adopted with the purpose of making uniform the conflicts law of the contracting states. The Geneva Conference resulted in the adoption of additional conventions designed to regulate certain conflict of laws problems with regard to Bills of Exchange and Promissory Notes (1930) and Checks (1931). The conflicts rules were included in a separate convention from the substantive uniform rules, thus permitting the states to sign the conflicts convention without accepting the uniform rules or vice versa. See Nolde, *La Codification du droit international privé*, [1936] I A.D.I.R.C. 303, 402.

64. See BARTIN, *op. cit. supra* note 60, at 86; DE NAUVOIS, *op. cit. supra* note 49, at 56.

65. See Hamel, *Perspectives et limites de l'unification du droit privé Actes du Congrès International de droit privé*, [1951] II L'UNIFICATION DU DROIT 60, 65.

66. See Matteucci, *supra* note 12.



ternational convention.<sup>67</sup> If all states in the world were to participate in such a convention, conflicts rules would lose most of their practical significance with regard to the subject matter regulated by the convention.<sup>68</sup> Persisting diversity of conflicts rules, indeed, would not work material harm, since, irrespective of the choice of law rules applied, the transaction would in any event be localized in one of the contracting states.<sup>69</sup>

When, as it usually happens, uniformity of substantive law is limited to a number only of contracting states, conflicts rules do not lose their practical significance.<sup>70</sup> As between such states, it may make little difference which of the uniform legislations apply; yet, localization of the transaction in one of the contracting states and determination of the applicable law will be always made in accordance with choice of law rules.<sup>71</sup> Further, conflicts rules will be necessary to solve conflicts problems arising due to different interpretations of the uniform law in the various contracting states and conflicts with the law of countries not participating in the convention.<sup>72</sup>

Ordinarily, the two approaches outlined hereinabove are combined, and conventions for uniform law result in unification of both substantive and choice of law rules.<sup>73</sup> In that case, interested parties may easily select the applicable law and readily ascertain its content which, apart from differences of interpretation,<sup>74</sup> is the same in all of the signatory countries.

As indicated, uniformity of substantive law and conflict rules does not avoid the necessity of resorting to choice of law rules.<sup>75</sup> Choice of law becomes completely unnecessary between contracting states only by virtue of international conventions introducing

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67. See Demogue, *L'unification internationale de droit privé* [1937] CLUNET 699, 722; Matteucci, *supra* note 4, at 152; Ripert, *La loi française du 2 avril 1936 sur le transport des marchandises par mer*, [1936] RIV. DIR. NVE. 367; Hamel, *supra* note 65, at 60, 69.

68. Cf. BARTIN, *op. cit. supra* note 60, at 86.

69. *Ibid.*

70. See Yiannopoulos, *Conflicts Problems in International Bills of Lading: Validity of "Negligence" Clauses*, 18 LOUISIANA LAW REVIEW 609, 611 (1958). But cf. BARTIN, *op. cit. supra* note 60, at 86.

71. Cf. text at note 5 *et seq. supra*; Bystrinsky & Landa, *The Unification of Laws on International Sale*, 6 REV. OF CONTEMP. L. 67, 101 (1959).

72. See Matteucci, *supra* note 4, at 152; Bystrinsky & Landa, *supra* note 71, at 101.

73. See DE NAUROIS, *LES TRAITÉS INTERNATIONAUX DEVANT LES JURISDICTIONS NATIONALES* 57 (1934); JENKS, *THE COMMON LAW OF MANKIND* 51 (1958).

74. Cf. BARTIN, *op. cit. supra* note 60, at 105; 3 NIBOYET, *TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANÇAIS* 383 (1944); note 49 *supra*.

75. See text at notes 71-72 *supra*.

uniform legislation applicable to international transactions or to both domestic and international transactions in accordance with specified contacts.<sup>76</sup>

In the first case, each country applies the same substantive rules of law as a modern "*jus gentium*" to all cases involving the specified international contacts,<sup>77</sup> without resorting to choice of law rules. Under such circumstances we have a juxtaposition between the rules adopted in the convention and the national regulation of the contracting states which may have a different content.<sup>78</sup> However, each country, though not under international obligation, may extend the application of the uniform rules to domestic transactions.<sup>79</sup> Indeed, the retention of two distinct bodies of law within the same jurisdiction may give rise to difficult questions of delimitation of their respective areas of application and may result in unequal administration of justice.<sup>80</sup>

In the second case, each state applies the same substantive rules of law whether the relations involve exclusively domestic or international contacts.<sup>81</sup> As in the preceding case, there is no room for application of a definite national law; and even further, citizenship of the parties and all other traditional contacts utilized to designate a transaction as "international" become ir-

76. See SCHERRER, *op. cit. supra* note 14, at 24; Demogue, *supra* note 67, at 722; 1 RIPERT, *DRIT MARITIME* 71 (1950); HAMEL ET LAZARD, *TRAITÉ DE DROIT COMMERCIAL* 54 (1954).

77. See Matteucci, *Les méthodes de l'unification du droit*, [1956] II L'UNIFICATION DU DROIT 2, 35. As to the juridical nature of the uniform rules included in such conventions, see text at notes 47 *et seq. supra*. A distinguishing feature of such conventions is ordinarily a provision delimiting unilaterally the area of application of the uniform rules. *Cf.* note 139 *infra*.

78. This method was followed, *e.g.*, in the Warsaw Convention on Air Transports, the two Bern Conventions on Rail Transports, and in the Geneva Protocol on Arbitration Clauses. Unification of law with regard to international transactions alone has the additional advantage of allowing freedom to drafting committees to adopt the best possible rule without following slavishly the pattern of a number of domestic legislations; and, further, adoption of such conventions by a large number of nations is facilitated by the fact that "supremacy" of the domestic law in the domestic sphere remains intact. *Cf.* Matteucci, *supra* note 77, at 55. The criteria adopted for the definition of "international" transactions frequently vary with the subject matter of the convention; thus difference of nationality of the parties, domicile of the contracting parties in different countries, and difference of points of departure and destination in connection with carriage contracts, have been utilized in a number of international conventions. *Cf.* Matteucci, *supra* note 77, at 55. Bystrinsky & Landa, *The Unification of Laws on International Sale*. 6 REV. OF CONTEMP. L. 67, 72 (1959).

79. See SCHERRER, *op. cit. supra* note 14, at 24; 1 RIPERT, *DRIT MARITIME* 72 (1950); *id.*, note 157 *infra*.

80. *Cf.* Yiannopoulos, *supra* note 17, at 520 *et seq.*

81. See SCHERRER, *op. cit. supra* note 14, at 24. Such are the Geneva Conventions on Bills of Exchange and Promissory Notes (June 7, 1930), and Checks (March 19, 1931). *Cf.* Limpens, *Les constantes de l'unification du droit privé*, [1958] REV. INT. DR. COMP. 287.

relevant. The uniform rules apply to the specified transactions either as law of the forum or as conventional law.<sup>82</sup>

### BRUSSELS CONVENTION

#### *Binding Force*

As in case of all conventions for uniform law, the effects of the Brussels Convention should be measured in the light of both international and domestic law.

There is no doubt that the obligations of the states adhering to the Brussels Convention are governed by international law.<sup>83</sup> However, in part due to disagreement as to controlling principles of international law, and in part due to conflicting interpretations of the text of the convention, writers are not in agreement as to the content of the international obligations assumed by the contracting states. Thus, conflicting views have been taken with regard to the intended method and scope of unification, the connected issue of the area of application of the uniform rules, and finally, the crucial problem of the determination as to which rules were intended to become uniform. The first two questions are discussed at length in another part of the present article.<sup>84</sup> With regard to the last problem, the prevailing view is that the rules intended to become uniform are included in Articles I to VIII of the convention.<sup>85</sup> It is submitted, however, that the text itself of the convention leads to the conclusion that the uniform rules are contained in Articles I to X. The remaining Articles XI to XVI contain provisions of a public law nature regulating the international effects of the convention and the relations among the contracting states.

Every international convention raises the issue of its direct application in municipal courts by virtue of ratification and operation of international law, and further, in case implementing legislation is enacted, the issue of the relations between the convention and the domestic legislation. The latter problem is ordinarily a theoretical one since in most instances conventions and corresponding domestic acts contain identical provisions.<sup>86</sup> In the case of the Brussels Convention, however, important varia-

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82. See text at notes 47 *et seq. supra*; 111 *et seq. infra*.

83. *Cf.* text at note 28 *supra*.

84. See text at note 114 *et seq. infra*.

85. See text at note 129 *et seq. infra*.

86. See MARKIANOS, *DIE ÜBERNAHME DER HAAGER REGELN IN DIE NATIONALEN GESETZE ÜBER DIE VERFRACHTERHAFTUNG* 51 (1960) (hereinafter Markianos).

tions between the text of the convention and that of the various national acts<sup>87</sup> render necessary an investigation with regard to the binding force of the convention as such on courts and individuals in the contracting states.

According to the prevailing opinion among scholars of international law, in absence of express intention of the contracting states, ratification produces effects only in the international sphere. It establishes an international obligation for the contracting states to take appropriate measures giving the force of law to the convention in the municipal sphere.<sup>88</sup> The text of the Brussels Convention contains no indication that the contracting states intended the convention to operate directly, and it follows that its applicability in municipal courts will necessarily depend on rules of municipal law. Further, the Protocol of Signature seems to strengthen this conclusion.<sup>89</sup>

In states where constitutional provisions require implementing legislation, it is clear that only such legislation has the force of law in municipal courts since neither international law nor domestic law attribute binding force to the convention as such. Problems, however, may arise in states where according to constitutional provisions properly signed and ratified international conventions become part of the law of the land. In such a case, the courts will have to decide whether the Brussels Convention is self-executing or not.<sup>90</sup>

While the issue is actually one of constitutional interpretation, the intention of the contracting states as evidenced in the text of the convention itself might be controlling under some constitutions.<sup>91</sup> It is submitted, however, that the Brussels Convention is self-contradictory in this regard. Its Article X might lead to the conclusion that the convention was intended to be self-executing while the Protocol of Signature might lead to the contrary conclusion.<sup>92</sup> Perhaps a reasonable interpretation is that the contracting states left the issue for individual determination by each state concerned.

A survey of results reached in several contracting states may

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87. In that regard, the most important variation between the Convention and several national Acts involves the limit of the shipowner's liability. See MARKIANOS 51.

88. See text at note 28 *supra*.

89. See text at note 103 *infra*. Cf. MARKIANOS 52.

90. Cf. text at note 38 *supra*.

91. Cf. text at note 39 *supra*.

92. Cf. text at note 103 *infra*.

be interesting in that regard. In the United States, it seems that the Brussels Convention has been regarded as self-executing.<sup>93</sup> However, the issue of its direct application in American courts has been circumvented by means of an "understanding" accompanying the act of ratification. According to this understanding, which was in effect a reservation,<sup>94</sup> if the provisions of the convention should conflict with the provisions of the Carriage of Goods by Sea Act, the latter should prevail.<sup>95</sup> The result of that understanding was then to define the scope of the international obligation assumed by the United States, and to control at the same time the domestic effects of ratification. The convention, though part of the law of the land according to the Constitution, was made applicable in American courts only to the extent its provisions were reenacted in the Carriage of Goods by Sea Act.

Among other contracting states, the issue of the direct application of the Brussels Convention in municipal courts may also arise in Monaco, Poland,<sup>96</sup> Spain,<sup>97</sup> and Switzerland<sup>98</sup> due to constitutional provisions and judicial practices reflecting monistic doctrines. In all these countries, in absence of authoritative judicial determination, conflicting views have been entertained by scholars, some assuming that the Brussels Convention is self-executing and others that implementing legislation was contemplated. In France, and in Italy, however, the issue has not been raised since the Brussels Convention has as such the force of law by virtue of its "execution" by implementing legislation.<sup>99</sup>

### *Juridical Nature*

The general disagreement among scholars of international law with regard to the juridical nature of conventions for uni-

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93. Cf. KNAUTH 153.

94. Reservations operate reciprocally and result in confining international conventional obligations within desired limits. In case of self-executing conventions, the domestic effects of the convention are determined on the basis of the reservation rather than the original text. See Dehaussy, *Les conditions d'application des normes conventionnelles sur le for interne français*, [1960] CLUNET 702; and in general, HOLLOWAY-ROUSSEAU, *LES RÉSERVES DANS LES TRAITÉS INTERNATIONAUX* (1958).

95. See KNAUTH 153. The text of the "Understanding" is reproduced *id.* at 77.

96. See MATYSIK, *PODRECZNIK PRAWA MORSKIEGO* (MANUAL OF MARITIME LAW) 32, 183 (1959). *But cf.* MARKIANOS 39, n. 39, 43, n. 6a.

97. See Farina, [1953] D.M.F. 415. *But cf.* MARKIANOS 55.

98. See HOSNER, *LA RESPONSABILITÉ DU TRANSPORTEUR MARITIME* 12, 15, 17 (1956). *But cf.* MÜLLER, [1960] D.M.F. 634.

99. See Yiannopoulos, *Bills of Lading and the Conflict of Laws: Validity of "Negligence" Clauses in France*, 7 AM. J. COMP. L. 516, 520 (1958); Gaeta, [1957] D.M.F. 697 (Italy).

form law is reflected in the attitude of legislators and courts in various states adhering to the Brussels Convention. Accordingly, in some states the convention is regarded as "international legislation,"<sup>100</sup> while in others as a "model" for domestic legislation.<sup>101</sup>

In that regard, it is not only general international law that fails to furnish definitive answers; recourse to the text of the convention itself also fails to establish generally acceptable propositions. Indeed, the convention seems to be self-contradictory with regard to its juridical nature and two different approaches are entirely justifiable in the light of its very text. In this connection, two provisions need consideration: Article X and the Protocol of Signature. Article X declares that "The provisions of this Convention shall apply to all bills of lading issued in the territory of any of the contracting States."<sup>102</sup> The Protocol of Signature, on the other hand, grants an option to the signatory countries to incorporate the uniform rules, if they so desire, in a form appropriate to their national legislation.<sup>103</sup>

At first sight, these provisions do not seem to answer the question whether the Brussels Convention was conceived as international legislation or as a model for domestic legislation; and, probably, at the time the Convention was drafted no one was concerned with theoretical differences prevailing in various parts of the world with regard to the nature of conventions for uniform law, or with the more specific question of the juridical nature of the Brussels Convention itself. Yet, both Articles X

100. See STÖDTER, *GESCHICHTE DER KONNOSSEMENTS-KLAUSELN* 99 (1956) (Internationales Recht); ASTLE, *SHIPOWNERS' CARGO LIABILITIES AND IMMUNITIES* 86 ("international legislation"); Delaume, Note, [1950] *REV. CR. DR. INT. PR.* 428; MARAIS, *LA LOI DU 2 AVRIL 1936 RELATIVE AUX TRANSPORTS DES MARCHANDISES PAR MER* 71 (1937); SAUVAGE, *LA LÉGISLATION NOUVELLE SUR LES TRANSPORTS MARITIMES DE MARCHANDISES* 149 (1937); Ripert, *La Conférence Diplomatique de Bruxelles*, [1923] *II REV. DOR.* 49. Cf. text at note 47 et seq. *supra*.

101. See KNAUTH 154; MARAIS, *LES TRANSPORTS INTERNATIONAUX DE MARCHANDISES PAR MER ET LA JURISPRUDENCE EN DROIT COMPARÉ* 18, 103 (1949); 1 RIPERT, *DROIT MARITIME* 72: "The International Convention is thus the model that each legislator should follow." But cf. Ripert, *La Conférence Diplomatique de Bruxelles*, [1923] *II REV. DOR.* 49, 50; *id.* *La loi française du 2 avril 1936 sur le transport des marchandises par mer*, [1936] *RIV. DIR. NAV.* 367, 368: "Not a model." Apparently, according to Professor Ripert the Convention is "international law" with regard to international transactions, and a "model" for domestic legislation with regard to transactions involving exclusively domestic contacts. See also text at note 128 et seq. *infra*.

102. See Convention, Art. X.

103. See Protocol of Signature; "The High Contracting Parties may give effect to this Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation, the rules adopted under this Convention." According to its opening sentence "the present protocol . . . will have the same validity as if the provisions thereof were inserted in the very text of the convention to which it refers."

and the Protocol of Signature were intended to regulate certain *practical consequences* of such theoretical distinctions; and thus, by answering the question whether the Brussels Convention should be given the force of law as such or by virtue of domestic legislation, both provisions seem to be relevant in the determination of the juridical nature of the convention.

Indeed, Article X is predicated on the assumption that the uniform rules were designed to have the force of law by virtue of an international convention as such,<sup>104</sup> and seems to adopt, by implication, the notion that a convention for uniform law creates rules distinct as to their origin and function from rules of domestic law. Further, it seems to have been conceived in view of a more or less uniform practice prevailing in Europe, where, according to constitutional provisions conventions become part of the law of the land by a series of public acts substantially different from ordinary legislative procedures.<sup>105</sup>

The Protocol of Signature, on the other hand, by granting an option to the contracting states to incorporate the uniform rules in a form appropriate to their national legislations, seems predicated on the contrary assumption that the convention was a model for domestic legislation.<sup>106</sup> The Protocol of Signature thus accords with the practice prevailing in England and the other members of the Commonwealth where conventions for uniform law are regarded as models acquiring binding force after transformation into domestic law by statute.<sup>107</sup>

The Protocol of Signature was a compromise.<sup>108</sup> In this connection, it should be mentioned that as a result of the option granted by the Protocol of Signature, an additional difficulty was circumvented. The uniform rules reproduced in essence Anglo-American ways of thinking as to both substance and form of drafting.<sup>109</sup> Introduction, therefore, of the convention as such

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104. Cf. text at note 47 *supra*.

105. Cf. Calogeropoulos-Sratis, *La ratification des traités d'après les constitutions récentes*, [1949] REV. HELL. DR. INT. 33; Oliver, *Historical Development of International Law*; *Contemporary Problems of Treaty Law*, [1955] II A.D.I.R.C. 421, 446, 449; VERDROSS, VÖLKERRECHT 68 *et seq.* (1955).

106. Cf. text at note 52 *supra*.

107. Cf. Mann, *The Interpretation of Uniform Statutes*, 62 L.Q. REV. 279, 290 (1946); Oliver, *supra* note 105, at 445.

108. See Stödter, *Zur Statutenkollision im Seefrachtvertrag*, in LIBER AMICORUM OF CONGRATULATIONS TO ALGOT BAGGE 220, 226 (1955).

109. See Necker, Comment, [1958] RECHT DER SCHIFFFAHRT No. 9/10 p. 12. See also STÖDTER, GESCHICHTE DER KONNOSSEMENTS-KLAUSELN 96, 97 (1954); Wüstendörfer, [1928] HANSA 931; *id.*, HAMBURGER FREMDENBLATT No. 157 A (June 7, 1928).

into the domestic order of continental nations might prove disastrous for the symmetry of their law and might create difficult problems of application and interpretation.<sup>110</sup> By granting an option to the contracting states to incorporate the uniform rules in a form appropriate to their legislation, the Protocol of Signature prevented further objections on that issue.

We may thus conclude that, neither on the basis of international law nor on the basis of the text of the convention, a general answer may be given to the question whether the Brussels Convention constitutes "international legislation" or merely a model for domestic legislation. The answer will necessarily depend on the accepted doctrines concerning international law and the positive law of each country.<sup>111</sup> Where conventions for uniform law are regarded as international legislation, and the Brussels Convention is given the force of law as such, the uniform rules may validly be regarded as rules of treaty law.<sup>112</sup> On the other hand, where conventions for uniform law are generally regarded as models, and advantage is taken of the option granted in the Protocol of Signature, the uniform rules may validly be regarded as model for domestic legislation.<sup>113</sup>

### *Scope of Intended Unification*

An investigation with regard to the scope of the intended unification by the Brussels Convention is important for the determination of the international responsibility of the contracting states. Such responsibility may differ with the type of the particular convention.<sup>114</sup> Thus, if the Brussels Convention was designed to unify only substantive rules of law, the obligations assumed by the contracting states would be fully discharged by the introduction of the necessary legislation as substantive law governing bills of lading; the area of application of that legislation could be freely determined according to traditional conflicts rules.<sup>115</sup> If the convention was intended to unify both substantive and choice of law rules, the several contracting states should introduce the uniform rules as substantive law and at the same

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110. See Stödter, *supra* note 108.

111. See text at notes 47 *et seq.*, 33-36, 51 *et seq. supra*.

112. Cf. Chauveau, *supra* note 25, at 581: "The supra-national nature of the convention is moreover formally admitted by Art. 26 of the French Constitution of Oct. 27, 1946, so that in case of any conflict with internal law, preference must be accorded to the Convention."

113. See *e.g.* Great Britain, text at notes 51, 107 *supra*.

114. Cf. text at notes 109, 29, 59, *supra*.

115. Cf. text at note 67 *et seq. supra*.



time should adopt the conflicts rules agreed upon; any other choice of law would constitute a violation of the convention.<sup>116</sup> If, on the other hand, the convention was conceived as special law applicable to international transactions, or to both domestic and international transactions, the international responsibility of the contracting states should be discharged by legislation introducing the uniform rules into the domestic law and making them applicable to the specified transactions.<sup>117</sup>

The preparatory works of the Brussels Convention offer no indication as to the scope of the intended unification, namely the area of application of the uniform rules and the closely connected problem of their relation to the national legislation of the contracting states.<sup>118</sup> The only relevant official statement in that regard is Article X of the convention (quoted above<sup>119</sup>) so that a brief reference to its history and interpretation may be relevant at this point.

Very little can be found in the oral proceedings of the Brussels Diplomatic Conference with regard to the origin and meaning of Article X.<sup>120</sup> The absence of discussion and comments may be due to the fact that the original Hague Rules, 1921, were designed for voluntary adoption by the shipping companies and were drafted in the form of a uniform bill of lading rather than in the form of a statute. Provisions regulating conflict of laws or corresponding to Article X were omitted.<sup>121</sup> Similarly, a draft Carriage of Goods by Sea Act put into circulation by the United Kingdom Chamber of Shipping did not include any provisions for the solution of conflict problems.<sup>122</sup> Such provisions appeared for the first time in the text submitted to the London Conference of the Comité Maritime International, in October, 1922.<sup>123</sup> Ar-

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116. Cf. text at note 73 *supra*.

117. Cf. text at note 75 *et seq. supra*.

118. The question was raised by Sir Leslie Scott, but was not discussed. See BRUSSELS CONFERENCE, PROCÈS-VERBAL DE LA SEPTIÈME SÉANCE PLÉNIÈRE, p. 153 (Sir Leslie Scott). See also p. 213.

119. See text at note 102 *supra*.

120. Cf. note 103 *supra*. The text of the uniform rules, and the several drafts of the Brussels Convention are reproduced in French and English in COMITÉ MARITIME INTERNATIONAL, Bulletin No. 65 (Conference of Gothenburg) 319 *et seq.* (1923).

121. See Stödter, *supra* note 108, at 225. Further, it seems that an extended discussion at the Hague Meeting on the nature of the uniform rules as "strict" law, and an optimistic view that once the law would become uniform conflicts would disappear, account for the conspicuous absence of elaboration on the area of application of the uniform rules and the solution of conflicts problems.

122. See COMITÉ MARITIME INTERNATIONAL, Bulletin No. 65 (Conference of Gothenburg) 336 (1923).

123. *Id.* at 349 *et seq.*

ticle IX of the proposed convention provided:<sup>124</sup> "The provisions of this Convention shall be applied in every Contracting State when either of the parties interested belongs to another contracting State and also in all other cases provided in the national legislations. However: (1) The principle enunciated in the preceding paragraph does not prejudice the right of the Contracting States not to apply the provisions of this Convention in favor of parties belonging to a non-contracting State. (2) When all the interested parties belong to the same State as the Court to which the case is submitted it is the municipal law and not the Convention which is applicable."

This lucid provision was eliminated, without apparent reason,<sup>125</sup> from the final draft submitted to the Brussels Diplomatic Conference of 1922. The Diplomatic Conference then added a new Article IX which read precisely the same as Article X of the final convention.<sup>126</sup> The same provision appears for the first time as Article X in the Draft Convention of the Subcommittee of the Brussels Diplomatic Conference, 1923, and it was kept as such until the convention was signed on August 25, 1924.<sup>127</sup>

The seemingly simple and clear language of Article X has given rise to much speculation as to its meaning and possible interpretation. Article X has thus been explained as an inter-governmental promise to enact legislation reproducing the substantive provisions of the convention, as a uniform choice of law rule providing for application of the law of the place of contracting, as a uniform rule delimiting the application of the convention to international bills of lading or to both domestic and international bills of lading. Finally, it has been suggested that Article X should be completely disregarded as devoid of meaning.

In accordance with the notion that conventions for uniform law are models for domestic legislation,<sup>128</sup> Article X has been explained in England, the United States, and the common law world in general as an express promise by each contracting state to enact as domestic law Article I to VIII of the convention, containing all substantive provisions.<sup>129</sup>

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124. *Id.* at 358, 371 *et seq.*

125. *Cf.* Stödter, *supra* note 108, at 225.

126. See COMITÉ MARITIME INTERNATIONAL, Bulletin No. 65 (Conference of Gothenburg) 375, 385 (1923).

127. *Id.* at 407 *et seq.*

128. See text at note 52 *supra*.

129. See BAUMERT, COMPARISON OF AMERICAN LEGISLATION AND THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELAT-

This interpretation cannot be accepted in view of the very language of Article X. Further, weight should be given to continental interpretations which consistently regard Article X as a conflicts rule and ignore completely the view that Article X constitutes an intergovernmental promise. Unlike the substantive provisions of the Brussels Convention which reproduce essentially Anglo-American ways of thinking, Article X seems to accord with continental doctrines concerning the juridical nature of conventions for uniform law.<sup>130</sup> And as Article X does not figure in the original Hague Rules but was first inserted in the Brussels Conference where the representatives from the common law world were in the minority, it is possible that Article X is the product of continental thought. Finally, the British delegates at the Conference clearly regarded the new article as a conflicts rule.<sup>131</sup>

Article X has been further explained as a uniform choice of law rule providing for the application of the law of the place of contracting, namely as establishing an obligation for the contracting states to make their conflicts rules uniform by applying the law of the place where the bill of lading was issued.<sup>132</sup> This view has been recently challenged on the ground that it is by no means clear that Article X refers to the law of the place of issue of the bill of lading; it is much more probable that it refers to

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ING TO BILLS OF LADING (1928), under Art. X: "The foregoing articles of the Convention are for the most part administrative in character and are obviously unsuitable for adoption by those countries choosing to incorporate the uniform rules as a part of their commercial codes or to enact the provisions in statutory form rather than as an international convention." See also KNAUTH 152, 154; Graveson, *Bills of Lading and the Unification of Maritime Law in the English Courts*, in *CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS* 57, 66 (1949).

130. See text at note 47 *supra*.

131. See REPORT OF BRITISH DELEGATES AT THE INTERNATIONAL MARITIME CONFERENCE HELD AT BRUSSELS ON THE 17TH-26TH OCTOBER, 1922, p. 23 (1923): "This is a new article. Under it the Convention applies to all bills of lading issued in any of the Contracting States. It was explained that we would only accept the article on condition that it is authoritatively explained in the 'Report' of the Conference as only applying to bills of lading in which a national of a foreign state is interested and not to cases in which (for example) all the parties are British."

132. See Dubosc, *De la loi applicable au contrat de transport maritime*, [1951] D.M.F. 214; PLAISANT, *LES RÈGLES DE CONFLIT DE LOIS DANS LES TRAITÉS* 13, 275 (1946); 2 RIPERT, *DRIT MARITIME* 803 (1929 ed.) (Art. X established a rule "traditionally known in France," namely, that the law of the place of contracting governs. See also 2 FRANKENSTEIN, *INTERNATIONALES PRIVATRECHT* 513, n. 61 (1934); 3 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 265 (1950). At least by implication, Art. X of the Brussels Convention was considered as establishing a choice of law rule in the recent works of the Sub-Committee on Conflict of Laws of the Comité Maritime Internationale. All three resolutions for a new convention designed to regulate conflict of laws with regard to international carriage of goods left intact the Brussels Convention. See note 63 *supra*; Stödter, *supra* note 108 at 222.

the law of the forum.<sup>133</sup> Further, it has been observed that Article X refers to the application of "this Convention" rather than to national legislation.<sup>134</sup>

In a recent publication, Professor Stödter of Hamburg suggested that Article X must be disregarded completely as devoid of meaning.<sup>135</sup> The argument runs as follows: Article X designates as applicable law the convention itself and not a certain national law; it was obviously adopted on the assumption that the convention would become part of the law of the land in the contracting states by direct promulgation.<sup>136</sup> However, as several countries were not prepared to sacrifice their national policies for the sake of international uniformity beyond a certain point, the Protocol of Signature was adopted. But, by granting an option to the contracting states to regard the convention as a model for domestic legislation, the Protocol of Signature destroyed the very assumption on which Article X rested. According to Professor Stödter, Article X and its reference to the "provisions of this Convention" would have a meaning only if the convention were to be adopted in its entirety; under the circumstances, no other meaning can be given to it.<sup>137</sup>

It is submitted that the Protocol of Signature is not irreconcilable with Article X. Actually, it is a reasonable interpretation that the option granted by the Protocol of Signature should be read in the light of, and should include, Article X. Accordingly, it is suggested that the contracting states, in case they chose to take advantage of the Protocol of Signature, they were still under an international obligation to enact Article X itself in a "form appropriate" to their national legislation. A corresponding provision of domestic law should read: "The provisions of this statute shall apply to all bills of lading issued in the territory of any of the contracting states." Thus, states promulgat-

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133. See Stödter, *Zur Statutenkollision im Seefrachtvertrag*, in *LIBER AMICORUM OF CONGRATULATIONS TO ALGOT BAGGE* 226, 230 (1955). According to Stödter, this is the prevailing doctrine in Great Britain and in the commonwealth in general. *Ibid.*

134. See Convention, Art. X, text at note 102 *supra*; Stödter, *supra* note 133, at 224. See also GRAMM, *DAS NEUE DEUTSCHE SEEFACHTRECHT NACH DEN HAAGER REGELN* 77, n. 7 (1938).

135. See Stödter, *Zur Statutenkollision im Seefrachtvertrag*, in *LIBER AMICORUM OF CONGRATULATIONS TO ALGOT BAGGE* 220, 230 (1955).

136. *Ibid.* In the same sense, see GUYON, *LES TRANSPORTS RÉGIS PAR LA LOI DU 2 AVRIL 1936*, p. 18 (1959).

137. Thus, according to Professor Stödter the only possible solution is the adoption of a new Convention designed to regulate problems of conflict of laws. *Id.* at 230. *Cf.* note 63 *supra*.

ing the convention as such would apply its provisions to all bills of lading issued in the territory of any of the contracting states while states enacting domestic legislation would apply it (as forum law) to precisely the same bills of lading.

For the reasons stated, Article X cannot be regarded as an intergovernmental promise or as a choice of law rule establishing application of the law of the place of contracting. Nor can it be completely disregarded. It is submitted, therefore, that the famous article is nothing more than a clause delimiting the area of application of the uniform rules, as conventional or as domestic law.<sup>138</sup> Such clauses are termed in the continental literature "unilateral conflicts norms."<sup>139</sup> The situation is thus not different from the case where, at the end of a statute, a clause is appended defining its area of application.<sup>140</sup> The courts in such cases are expected to apply the statute in accordance with the specified contacts and without reference to the general conflicts rules, which, ordinarily, operate "bilaterally."<sup>141</sup> Originally it was thought that the convention itself would be given the force of law and thus according to Article X the uniform rules would apply to all bills of lading issued in the territory of any of the contracting states. When the Protocol of Signature was adopted, and the contracting states were given the option to enact legislation in an appropriate form, the situation did not change. Article X, transformed into domestic law, would still operate as a unilateral choice of law rule of the forum.<sup>142</sup>

Relying on conflicting interpretations of Article X, and on varying conceptions with regard to the juridical nature of conventions for uniform law,<sup>143</sup> legislators, courts, and writers in various contracting states have taken opposite and conflicting views with regard to the scope of the intended unification. Ac-

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138. A rule delimiting the area of application "indicates that the enactment in question only applies to acts connected with the territory of the enacting legislature in a particular way." See Morris, *The Choice of Law Clauses in Statutes*, 62 L.Q. REV. 170, 172 (1946). *Of.* text at note 111 *supra*.

139. See WIETHÖLTER, *EINSEITIGE KOLLISIONSNORMEN ALS GRUNDLAGE DES INTERNATIONALEN PRIVATRECHTS* (1956). Professor Nussbaum calls the latter "spatially conditioned internal rules." *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 71 (1943).

140. For purposes of conflict of laws, statutes may be divided in three categories: (1) those with no choice of law clause at all; (2) those with a bilateral choice of law clause; and (3) those with a unilateral clause purporting to delimit the scope of the domestic law. See Morris, *The Choice of Law Clauses in Statutes*, 62 L.Q. REV. 170 (1946).

141. See Morris, *supra* note 140.

142. See text at note 138 *supra*.

143. See text at note 49 *et seq. supra*.

cordingly, it has been suggested that the convention was designed to unify substantive rules of law only, both substantive and conflicts rules, to introduce special legislation applicable to international bills of lading or to both international and domestic bills of lading.

According to one line of thought, the purpose of the Brussels Convention was to unify only the substantive law of the contracting states with regard to the regulation of bills of lading.<sup>144</sup> This conclusion is reached by interpreting Article X as a promise to introduce Articles I to VIII of the convention as domestic law.<sup>145</sup> In such a case, each country is free to delimit the application of the uniform (forum) law and to adopt choice of law rules governing all transactions outside the scope of the forum law.<sup>146</sup> If all contracting states had adopted this interpretation, the uniform rules would apply in accordance with the prevailing conflicts rules, differing with the forum; and uniformity could be achieved only as to contracts localized in one of the contracting states.

Further, it has been pointed out that the Brussels Convention was designed to make uniform both the substantive law of the contracting states and their conflicts rules governing bills of lading.<sup>147</sup> This view seems to be based on an implied promise to enact as domestic law Articles I to X of the convention while Article X is regarded at the same time as a choice of law rule establishing applicability of the law of the place of contracting.<sup>148</sup> It follows that, in such a case, the contracting states would not be free to adopt conflicts rules of their choice.<sup>149</sup> If this view were generally adopted, courts sitting in signatory states would apply the uniform rules as *law of the place of contracting* to all bills of lading issued in any of these states; bills of lading issued in the forum state would be subject to the forum law and bills issued in other contracting states would be subject to the uniform rules as incorporated and interpreted in those

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144. Cf. CARVER, CARRIAGE OF GOODS BY SEA ACT 207 (1952); note 129 *supra*.

145. See text at note 129 *supra*.

146. Cf. Diena, *Principes du droit international privé maritime*, [1935] A.D.I.R.C. 409, 414; 1 RIPERT, DROIT MARITIME 72, 73 (1950).

147. See Algot Bagge, Motives of the First Draft Resolution p. 15, Comité Maritime International, International Sub-Committee on Conflict of Laws, Minutes of the Brighton Meeting (Sept. 21, 1954); Stödter, *supra* note 108, at 222. See also text at note 132 *supra*.

148. See text at note 132 *et seq. supra*. According to Stödter, *supra* note 108, at 226, this is the prevailing doctrine in France and in the Scandinavian countries.

149. Cf. text at note 116 *supra*; Diena, *supra* note 146, at 414.

states. Bills of lading issued in non-signatory states would be governed by the law of these states and, normally, the uniform rules would not apply. Finally, courts sitting in non-signatory countries would also apply the uniform rules to bills of lading localized in a country adhering to the convention.

The prevailing opinion, at least among continental scholars, is that the Brussels Convention was designed to eliminate both conflicts and choice of law.<sup>150</sup> Yet, there is a sharp division of opinion as some writers suggest that the convention was intended to apply to international bills of lading only, while others declare that its purpose was to cover both domestic and international bills of lading.

Several writers, relying on the Protocol of Signature<sup>151</sup> and on the reservation filed by the delegate of Japan with regard to domestic trade,<sup>152</sup> suggest that the Brussels Convention intended to make uniform the law applied to international bills of lading alone.<sup>153</sup> This view is supported, further, by the practice fol-

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150. See AUBRUN, *LES TRANSPORTS DE MARCHANDISES PAR MER* 129 (1938); SAUVAGE, *LA LÉGISLATION NOUVELLE SUR LES TRANSPORTS MARITIMES DE MARCHANDISES* 129 (1937). Cf. *Exposé de Motifs*, Chambre, Annex No. 719 p. 32.

151. See Protocol of Signature § 2: [The High Contracting Parties may reserve the right - ] "To apply Article 6 insofar as the national coasting trade is concerned to all classes of goods without account of the restrictions set out in the last paragraph of that article." This section figured already in the Protocol of Signature prepared by the Sub-Committee of the 1923 Brussels Conference. See COMITÉ MARITIME INTERNATIONAL, Bulletin No. 65 (Conference of Gothenburg) 420, 434 (1923). On the history and interpretation of the Protocol of Signature, see Ripert, *La Commission de Bruxelles*, [1923] IV REV. DOR. 55, 57, 58. The Protocol of Signature has not exempted from the uniform rules the coastal trade as a whole, but only certain shipments and under certain circumstances. Yet, it has been interpreted as allowing legislative freedom to the contracting states with regard to bills of lading involving exclusively domestic contacts, and with regard to the entire domestic trade as such!

152. See note attached to the letter of August 25, 1925 from his Excellence the Japanese Ambassador to the Belgian Minister for Foreign Affairs: "(b) Japan is of opinion that the Convention, as a whole, does not apply to the national coasting trade, and consequently there is no need to make it the object of a provision in the Protocol. At the same time, if this is not the case, Japan reserves the right to provide freely for the national coasting trade by its own legislation." See CARVER, *op. cit. supra* note 144, at 1085.

153. See SCHERRER, *op. cit. supra* note 13, at 33; SCHNITZER, *op. cit. supra* note 14, at 33; Ripert, *La loi française du 2 avril 1936 sur le transport des marchandises par mer*, [1936] RIV. DIR. NAV. 367, 368; Prodromides, *Champs d'application respectifs de la Convention de Bruxelles du 25 août 1924 sur les connaissements et de la loi du 2 avril 1936*, [1956] D.M.F. 123, 124; Limpens, *Les constantes de l'unification du droit privé*, [1958] REV. INT. DR. COMP. 277, 288; Levebre d'Ovidio, *Legge nazionali e responsabilità degli armatori*, [1940] I RIV. DIR. NAV. 285, 300-302; POËNCES DE LA PLESSE, *LE PROBLÈME DE L'UNIFICATION DU DROIT COMMERCIAL MARITIME* 197 (1932). Cf. WÜSTENDÖRFER, *NEUZEITLICHES SEEHANDELSRECHT* 31 (1950); Malintoppi, *Diritto uniforme e diritto internazionale privato in tema di trasporto* 118-129, in UNIVERSITÀ DEGLI STUDI DI CAMERINO, *ANNALI DELLA FACOLTÀ GIURIDICA* (1955).

lowed in a number of other international conventions for uniform law, and by the consideration that the high contracting parties had a justifiable interest only in the uniform regulation of international bills of lading. This limited purpose could be achieved by subjecting all such bills of lading to a substantive regulation which would be the same everywhere, and which would govern without reference to choice of law rules. However, the suggested interpretation conflicts with the language of Article X; and unless that article is disregarded this view cannot be accepted. Moreover, there is nothing in the convention indicating which bills of lading are "domestic" and which "international," nor agreement among scholars as to the criteria for such a distinction.<sup>154</sup> Nevertheless, had all countries adhered to this view, "international" uniformity would have been achieved in a large number of cases. Courts sitting in a signatory country would apply the uniform rules to all "international" bills of lading issued in the territory of any contracting state, including that of the forum state. Domestic bills of lading, and bills of lading issued in non-signatory countries, would be subject to the governing law in accordance with the conflicts rules of the forum. Finally, courts sitting in non-signatory countries would apply the uniform rules to international bills of lading localized in one of the signatory countries.

It is submitted that the Brussels Convention was designed to make uniform the law applied to bills of lading involving both domestic and international contacts.<sup>155</sup> The literal meaning of Article X is that the rules adopted in the Brussels Convention should apply to *all* bills of lading (regulated by the convention) issued in *any* of the contracting states. Applied as such, or transformed into domestic law, Article X would import the uniform rules, irrespective of all other contacts, to all bills of lading issued in the forum state or in any other contracting state.<sup>156</sup> In this sense, Article X is not a choice of law rule providing for application of the law of the place of contracting, nor a promise to incorporate Articles I to VIII of the convention into domestic law, but a rule delimiting the application of a body of uniform

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154. Cf. Yiannopoulos, *supra* note 17, at 522.

155. In this sense see also Pergeroux, *L'introduction en France des conventions sur l'unification du droit maritime*, [1936] ANN. DR. COMM. 216; Berlingieri, *La convenzione di Bruxelles sulla polizza di carico ed il codice della navigazione*, [1952] DIR. MAR. 489, 500-502; COLE, *THE HAGUE RULES EXPLAINED* 2, 4 (1924); HOSNER, *LA RESPONSABILITÉ DU TRANSPORTEUR MARITIME* 17-18 (1956); and MARKIANOS 32 *et seq.* advancing dogmatic, historical, and policy arguments.

156. Cf. text at note 142 *supra*.



substantive rules to both domestic and international bills of lading. Actually, there is nothing revolutionary in this view; several other conventions paved the way as it became increasingly apparent that it may be both unfair and impractical to permit the parallel operation of two distinct legal orders, one for domestic and the other for international transactions.<sup>157</sup>

Thus, in spite of theoretical efforts designed to justify the retention of a national legislation parallel to the uniform regulation,<sup>158</sup> it seems that Article X established in simple and clear terms a uniform regime for both domestic and international bills of lading. The only relevant contact for application of the uniform rules is the place of issue of the bill of lading in a contracting state; as to such bills of lading differences among national legislations are swept away. Thus, only bills of lading *not* covered by the convention or bills of lading issued in non-contracting states might still be subject to national substantive regulation and to national conflicts rules, as any other transaction involving international contacts. If all contracting states had followed this interpretation, a court sitting in any of these states would apply the uniform rules (as incorporated in the forum state) to all bills of lading issued in any contracting state (including the forum) regardless of all other contacts. The same courts would be free to apply other than uniform law to bills of lading not covered by the convention, or to those issued in non-contracting states; as to such bills of lading not only substantive law but also choice of law rules could differ with the forum. On the other hand, courts sitting in non-contracting states would apply the law referred to by their conflicts rules; and the uniform rules would still apply to bills of lading localized in a contracting state.

### CONCLUSIONS

Doctrinal conflicts of opinions concerning binding force, scope of unification, and juridical nature of conventions for uniform law in general are reflected in efforts at interpretation of the Brussels Convention on Bills of Lading. In that regard, our own analysis of the text of the convention in the light of international theory and practice, has led to the following conclusions:

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157. See 1 RIPERT, *DROIT MARITIME* 72 (1950) ("A country has no excuse in refusing to adopt as national law what it has already adopted as international law). See also *id.*, [1923] II *REV. DOR.* 65.

158. *Cf.* text at note 135 *et seq. supra.*

1. In the absence of reservation to the contrary, the several contracting states assumed an international obligation to give the force of law within their territories to Articles I to X of the convention. The convention is not directly applicable in national courts by virtue of a rule of international law; its municipal effects depend on rules of national constitutional law.

2. Neither international law nor the text of the Brussels Convention offer conclusive answers as to its juridical nature. The answer to this question will also depend on accepted doctrines concerning international law and on the positive law of each country.

3. Concerning the intended scope of unification, it has been shown that the purpose of the Brussels Convention was to make uniform both substantive and choice of law rules governing international and domestic carriage of goods by sea-going vessels under bills of lading.

4. Finally, with regard to the expected effects of unification on conflict of laws problems, it has been shown that the Brussels Convention was intended to eliminate, as between contracting states, conflicts of both substantive and choice of law rules. It was hoped that (1) by making uniform the substantive rules applied to bills of lading (Articles I to VIII), and (2) by imposing a uniform delimitation of these rules (Article X), the outcome of a possible litigation would be the same in the courts of any of the contracting states. And this would be so whether the convention was regarded as international legislation or as a model for domestic legislation, or whether it was to be given the force of law in its entirety or in a form appropriate to the national legislation of the contracting states.